Supreme Court, U.S.
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No. (1)

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

NANCY A. ROBBINS AND EDWARD W. ROBBINS,

Petitioners,

vs.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CORRECTED PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a takings case, does "economic futility" constitute a recognizable exception to the ripeness doctrine?

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OPINIONS AND ORDERS BELOW

The judgment of the United States Court of Appeals for the Federal Circuit is located at Appendix (hereinafter "App.") 1. The opinion of the United States Court of Federal Claims is located at App. 3 and that court's judgment is located at App. 2.

STATEMENT OF JURISDICTION

Petitioners (hereinafter "Robbins") brought their claim for taking against the United States in the United States Court of Federal Claims pursuant to 28 U.S.C. § 1491. On February 20, 1998 the trial court granted summary judgment in favor of the United States and Robbins timely filed their notice of appeal to the United States Court of Appeals for the Federal Circuit on April 17, 1998 pursuant to Fed. R. App. P. 3. The United States Court of Appeals for the Federal Circuit entered judgment on December 10, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

This is a takings case wherein Robbins allege the United States took Robbins' sales contract of $351,000 or alternatively took Robbins' land. After discovery was conducted, the trial court granted summary judgment in favor of the United States, notwithstanding affidavits from Robbins' experts demonstrating that the property lost all economic value and notwithstanding a claim by Robbins that it would have been economically futile to apply for a permit.

The property at issue is 39 acres of gently rolling pasture located in Paris, Tennessee. The property is bordered on the east and west boundaries by the Smallwood and McGowan Creeks respectively. Although situated between two creeks during the 22 years Robbins have resided there they have never experienced significant problems with flooding or excessive wetness. In fact, a considerable portion of the property has been farmed for over 20 years. Much of the open land consists of fescue fields that are harvested for hay annually.

Robbins selected the property with an eye towards securing their financial future. Because the property fronted U.S. Route 79, a major thoroughfare in Paris, the Robbins were confident that it would greatly appreciate in value. This factor became all the more important in late 1984, when Mr. Robbins suffered an injury that rendered him disabled and unable to work. Although the income from Mrs. Robbins' dress store was sufficient to support the family, because her husband was unable to work the Robbins were keenly aware that their future economic security was dependent upon the commercial value of their land.

By the early 1980s it was evident to the Robbins that their nest egg would at long last pay off. The area in which their property was located was developing rapidly. Property along Route 79, near the Robbins, was selling for tens of thousands of dollars per acre. For example, 3.3 acres of naked land that borders the Robbins' property sold for $60,000 in November 1987. Then in April 1993 an additional six acres sold beside the first three acres for $300,000. And in September 1993 the McKenzie Bank paid $200,000 for an acre located on the same highway 1.6 miles away. By the mid 1990s most of the property adjoining the Robbins had succumb to commercial development. Peppers, an automobile dealership, was located on the land next to the Robbins and Trollingers, a combination restaurant and butcher shop, was located across the street.

In early March 1994 the Robbins thought that their plans for future financial security would finally materialize. Joe Lipps, a local

realtor, called Ms. Robbins at her dress shop to inform her that he had a buyer interested in her property. Mrs. Robbins stated she would accept $8,000 per acre but was only interested in selling the property in its entirety. The buyer, Keith Baker, subsequently accompanied Mr. Lipps and several others to view the Robbins' property. Following an examination of the property Mr. Baker made an offer of $325,000. Mrs. Robbins eventually negotiated, through Mr. Lipps, a final sale price of $351,000, or $9,000 per acre.

Mr. Baker intended on subdividing the Robbins' property, selling off the home and adjoining acres and developing the remainder. He planned on leveling off the land adjacent to Route 79 and constructing a mobile home sale center. He calculated that it would cost no more than $50,000 to ready the property. It should be understood that Mr. Baker is a very successful business man and in no way new to the real estate game. At the time he offered to purchase the Robbins' property he owned six mobile home facilities throughout the state of Tennessee. He employs over 70 people and his gross receipts for each of the last two years exceeded 33 million dollars. It was against this backdrop that Mr. Baker selected the Robbins' property. He justifiably believed that the property had great potential because of its prime location on Route 79.

Soon after the deal was negotiated, Mr. Lipps raised the issue of wetlands on the Robbins' property. Apparently, Mr. Lipps had made inquires with the city concerning fill permits and was told that there would not be a problem except that he may want to check if the property's use was restricted by wetlands legislation. Mr. Lipps conveyed this information to Mrs. Robbins. Initially, Mrs. Robbins thought nothing of wetlands issues, after all, she had farmed the property for the last 20 years and would have never considered her fertile pastures to be lands that harbored aquatic life. Mrs. Robbins subsequently contacted the City Business Manager who directed her to the Soil Conservation Service. The Soil Conservation Service informed her that since the property adjoining hers was prior converted wetlands that

perhaps her's was as well. Mrs. Robbins was then referred to the Army Corps of Engineers.

On March 14, 1994 a representative of the Army Corps of Engineers (hereinafter "COE") showed up to inspect the Robbins' property for wetlands. At the time, Paris, Tennessee was seven and a half inches above normal rainfall. There was standing water on the parcel of land that was being filled across the street and at various locations on the Robbins' property as well. After briefly examining the property the field inspector declared that the Robbins owned a wetland. Although the field inspector indicated that he relied on the "1987 Manual" to make his determination, when Mrs. Robbins' later questioned him concerning the scientific basis for his findings, he replied that he saw the mud on Mrs. Robbins' shoes to determine hydrology.

The field inspector did provide Mrs. Robbins with what he considered useful advice. He indicated to Mrs. Robbins that she need not worry because based on his experience "she had the buyer over a barrel." He stated the buyer would either buy the property or lose his $100,000 because she already had a contract. Mrs. Robbins informed him "this is not the way she did business and that she does have to sleep every night."

On March 28, 1994 the COE notified the Robbins by letter of their determination. The COE indicated the subject property was below the headwaters in the McGowan Branch Watershed and that it contained evidence of three characteristics of regulated wetlands on a large portion of the property, including a majority of the highway frontage on State Route 79. The COE advised Mrs. Robbins that she retain a qualified wetlands expert to assist them in making a delineation of the property.

Thereafter, Mr. Lipps informed Mr. Baker the COE had designated the Robbins' property as wetlands. Mr. Baker then consulted with his attorney and subsequently drafted a letter to Mr. Lipps demanding the contract be nullified. Mr. Baker notified Mr. Lipps that he was entitled, under ¶ 14 of the contract, to the return of the earnest

money held in escrow and a recission of the contract because although the seller was aware of his intended use they failed to disclose the existence of wetlands on the property and the need to obtain federal permits prior to development of such lands. Paragraph 14 of the land sales contact permitted recission in the event that the seller could not transfer "merchantable title . . . which is acceptable to the buyer." Because the existence of wetlands on the subject property rendered such land unfit for Mr. Baker's intended purpose his nullification of the contact seemed entirely appropriate.

Mrs. Robbins did not attempt to sue Mr. Baker for breach of contract. Although she did not consult an attorney, she believed that Mr. Baker was within his rights to cancel the land sales contract given that the existence of wetlands, which was unbeknownst to either party, rendered the property unsuitable for its intended purpose. Despite the fact that she and her husband were dependent on the sale of their land for their future economic security, Mrs. Robbins, out of a sense of decency and fairness chose not sue on the contract.

Upon realizing what had transpired, Mrs. Robbins knew at once that she had to act if she was to salvage her future economic security. She wrote to the COE explaining that because of her husband's disability and the family's limited resources she could not afford to pay $3,000 to hire an independent consultant to perform the wetlands delineation. Initially, the COE failed to respond to Mrs. Robbins' request. After contacting several officials in Washington, DC, as well as her state representatives, the COE decided, in July 1994, to conduct a joint wetlands delineation of the Robbins' property with the State of Tennessee, Department of Environmental Conservation (hereinafter "DEC").

The COE and DEC performed fieldwork on the Robbins' property in August 1994, and issued the delineation report on October 12, 1994. The report indicated that 25 acres of the Robbins' property constituted regulated wetlands. The alleged wetlands were located in the

east end of the property near Smallwood Creek and to the west in the area adjoining McGowan Creek.

In the interim, Mrs. Robbins felt that she had no choice but to hire her own consultant. She retained a certified wetlands scientist, Dr. Thomas Heinke, who conducted a field investigation of the Robbins' property on July 27, 1994. Following his field investigation and a review of the October 12, 1994 joint delineation report, Dr. Heinke concluded that while the Robbins had wetlands on their property, the extent of such wetlands was grossly exaggerated. Dr. Heinke concluded that the fescue dominated portions of the site are not jurisdictional wetlands.

The COE responded to Dr. Heinke's objections by letter on March 13, 1995. They remained steadfast in their belief that all the areas designated were in fact jurisdictional wetlands. In July 1995 the COE decided to re-evaluate the Robbins' property. They conducted another field investigation on December 13, 1995, finding that their original designations were correct, that 25 acres of the Robbins' 39 acre farmland was jurisdictional wetlands.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE TRIAL COURT'S OPINION CONFLICTS WITH THIS COURT'S PRIOR RULINGS REGARDING RIPENESS

Generally, a claim that the "application of government regulations constitutes a taking of private property is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985). Thus, takings claims are generally not cognizable until the requisite permit has been applied for and denied. United States v. Riverside Bayview Homes Inc., 474 U.S. 121 (1985).

The trial court adopted the government's position that because the Robbins failed to apply for a Section 404 permit, their claim was not ripe. This is erroneous because the Robbins never had any desire to fill the wetlands and had no reason to apply for a permit. Robbins had a contract for $351,000.00 to sell the land. They had no desire to develop the land or make any commercial use of the property themselves. Moreover, the cost of mitigation for a permit would greatly exceed the $351,000.00 contract price.

Courts have recognized that exhaustion of administrative remedies is not required in every instance. A landowner is not required to engage in futile pro forma exercise of agency review when no possibility exists that a permit will be granted. *See e.g.*, MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 350 n.7 (1985); Broadwater Farms Joint Venture v. United States, 35 Fed. Cl. 232, 235 (1996). For example, in Parkview Corp. v. Dept. of Army Corps Engineers, 490 F.Supp. 1278, 1282 (E.D. Wis. 1980), the court held that the landowner was not required to exhaust its administrative remedies because the COE's district engineer had made clear that a § 404 permit would not be forthcoming. Similarly, in Broadwater Farms Joint Venture v. United States, 35 Fed. Cl. 232, 235-37 (1996), the court held that the plaintiff was not required to pursue a § 404 permit in light of the fact that the Corps enforcement stance was equivalent to a denial of a permit for any residential development in the lots designated as wetlands. And in Hage v. United States, 35 Fed. Cl. 147, 164 (1996), the court held that it is not necessary to apply for a permit if the process is so burdensome or futile that it effectively deprives the property of value.

In the instance case it would be futile for Robbins to have resorted to the § 404 permit process with respect to either of the alternative takings claims. First, with regards to Robbins' contract claim, the § 404 permit process is inapplicable because the complained of taking was consummated upon the designation of the subject property as wetlands. Once the subject property was designated wetlands the buyer rescinded the land sales contract. It was at this point that

Robbins' takings claim ripened because no further agency action was required in order to determine the precise nature and impact of the regulatory interference. Designation of the subject property as wetlands had the same affect as if the government physically appropriated the land itself. An after the fact § 404 permit application would in no way serve to clarify the extent to which the regulatory action interfered with Robbins' property rights. Because as noted, once the designation occurred, the taking of the land sales contract was complete.

Resort to the § 404 permit process would also be futile with respect to Robbins' second takings theory. First, resort to the application process on these facts would be unduly burdensome. Robbins own 39 acres of land, 25 of which has been designated as wetlands. Assuming, *arguendo*, that Robbins could even satisfy the initial requirements for submitting a permit application (*i.e.*, submission of a development plan site) they would, because of their limited financial means, be unable to satisfy the stringent mitigation requirements. Under the present regulations, to receive a permit, landowners are required to "donate" from one to three acres of non-wetland and turn it into a wetland for each acre they are permitted to fill. The average is two acres for each acre filled. Using the average two-for-one ratio, Robbins would be required to "donate" 50 acres in order to receive a fill permit for the twenty five acres designated as wetlands. At a conservative per acre cost of $10,000, Robbins would be required to expend $500,000 to comply with the permit process. Given the land sales contract price of $351,000, it would be economically futile for Robbins to have to resort to the § 404 permit process.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE TRIAL COURT WAS PLAINLY WRONG IN FAILING TO PROPERLY CONSIDER AFFIDAVITS OF REAL ESTATE EXPERTS UNEQUIVOCALLY SHOWING ROBBINS' LAND LOST ALL ECONOMIC VALUE FROM GOVERNMENT ACTION THEREBY GIVING RISE TO LUCAS TAKING

The Fifth Amendment of the United States Constitution provides in relevant part: "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. This Court has stated the "Fifth Amendment is intended to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Penn. Central Transp. Co. v. New York City, 483 U.S. 104, 123 (1978) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

It is well established that the government need not physically appropriate the property at issue for a taking to occur. *E.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-19 (1992). Rather, a taking may also occur when the government by its actions deprives an owner of all or most of its compensable interest in the property. Id. As stated by Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922): "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

To date, this Court has failed to articulate a "'set formula' for determining when justice and fairness require that economic injuries caused by public action be compensated by the government." Rather, this Court has indicated that such determinations ultimately turn on the facts of the individual case. Id.; Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). In Penn Central Transp. this Court did, however, identify three factors that have particular significance in determining whether a regulation goes so far as to constitute a compensable taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has

interfered with distinct investment backed expectations; and (3) the character of the government action. 438 U.S. at 124. *See also*, 767 Third Street Associates v. United States, 48 F.3d 1575, 1580 (Fed. Cir. 1995).

The United States Court of Appeals for the Federal Circuit has held that because the question of whether a taking has occurred is frequently fact-intensive, requiring the development of a complete record through trial, there needs to "be an extraordinary set of facts in order" to grant a motion for summary judgment in a takings case. Yuba Goldfields Inc. v. United States, 723 F.2d 884, 887 (Fed. Cir. 1983). Summary judgment is only appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986); Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987). In considering a motion for summary judgment, the evidence must be viewed, and drawn, in the light most favorable to the non-moving party. Litton Indus. Prod., Inc. v. Solid State Sys. Corp., 755 F.2d 158, 163 (Fed. Cir. 1985); 767 Third Avenue Associates v. United States, 30 Fed. Cl. 216, 218 (1993).

As this Court made clear in Lucas, 505 U.S. at 1004, the economic impact factor may be dispositive if the regulation deprives the landowner of "all economically viable use" of the property. In 1975, the Robbins purchased the property as an investment that they eventually planned to sell in order to provide for their retirement. App. 4. As a result of the government's wetland's designation, all economically viable use of the Robbins' land is gone. This conclusion is reached by the real estate experts and supported by affidavits. (See Affidavits of William M. Johnson, A209, Samuel R. Striker, A211 and Harold Bass, Jr., A217.).

Mr. Johnson testified "[n]ow that the Robbins' property is deemed a wetlands, the Robbins' property has very little, if any, economic value. Now that the Robbins' property is deemed a wetlands, the economic value of the property has been destroyed and it is highly

unlikely that a buyer will make a reasonable offer on the Robbins' property, if any offer at all." Mr. Striker's affidavit and Mr. Bass' affidavit also state that the Robbins' property has no economic value because it has been deemed a wetland.

This testimony is more than sufficient to establish a Lucas takings claim and withstand a summary judgment motion. In fact, the trial court stated that "it is open to dispute what the fair market value of the property was before and after the alleged taking occurred." (App. 8, footnote 6). Because this constitutes a dispute as to a material issue of fact, summary judgment is precluded as a matter of law. The trial court considered the affidavits (App. 11 n.5), but failed to view the affidavits in a light most favorable to the Robbins.

The trial court held that "[a]ssuming, *arguendo*, that the property's value did decrease, longstanding precedent nevertheless holds that the mere 'diminution in a property's value, however serious, is insufficient to demonstrate a taking.'" (App. 11). This finding is erroneous. It directly contradicts the affidavits of Robbins' experts. The trial court reached this finding based upon weighing the evidence, not accepting Robbins' evidence as true.

CONCLUSION

In a takings case, economic futility constitutes a legitimate exception to the ripeness doctrine. Summary judgment was inappropriately granted because the question of a taking is fact intensive, requiring a complete record through trial, and only an "extraordinary set of facts" justifies summary judgment. Such extraordinary facts do not exists in this case to justify summary judgment for the government. Questions of material fact exist regarding the loss of all economic viable use of the Robbins' property and whether government action was the sole reason for the Robbins' loss of the sales contract. Wherefore, Robbins respectfully request that this petition be granted.

Dated: March 10, 1999.
Corrected Date: May 1, 1999.

Respectfully submitted,

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APPENDIX

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

98-5102

NANCY A. ROBBINS and EDWARD W. ROBBINS,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
DEC 10 1998
JAN HORBALY
CLERK

Judgment

ON APPEAL from the United States Court of Federal Claims
in CASE NO(S). 96-CV-779
This CAUSE having been heard and considered, it is
ORDERED and ADJUDGED:

Per Curiam (MICHEL, CLEVENGER and BRYSON, Circuit Judges):

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED DEC 10 1998 "s/ Jan Horbaly/BS"

In the United States Court of Federal Claims

No. 96-779 L

NANCY A. AND EDWARD W. ROBBINS,

JUDGMENT

v.

FILED FEB 24 1998

THE UNTIED STATES

Pursuant to the court's published Opinion, filed February 20, 1998, granting defendant's motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered for defendant. No costs.

David A. Lampen
Clerk of Court

February 24, 1998 By: "s/ T. L. White"
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of all plaintiffs. Filing fee is $105.00.

In the United States Court of Federal Claims

No. 96-779L

(Filed February 20, 1998)

**********	
NANCY A. and EDWARD W. ROBBINS,	* Takings; summary judgment; taking * by causing buyer to rescind land
Plaintiffs,	* sales contract; Clean Water Act, * Federal Water Pollution Control
v.	* Act Amendments of 1972, § 404, * as amended 33 U.S.C. § 1344
THE UNITED STATES,	* (1944); permitting process; * ripeness.
Defendant.	*
**********	

Paul J. Harris, Richmond, VA, for plaintiffs.

Pamela S. West, Washington, DC, with whom was **Assistant Attorney General Lois J. Shiffer**, for defendant. Robert V. Smyth, U.S. Army Corps of Engineers, Nashville, TN, of counsel.

OPINION

MILLER, Judge.

This case is before the court after argument on defendant's motion for summary judgment. The issue is whether the designation and/or delineation of plaintiffs' property as jurisdictional wetlands -- resulting in the recision of a private contract to sell the property -- constitutes a compensable taking under the Fifth Amendment.

FACTS

The following facts are undisputed, unless otherwise noted.

Nancy A. and Edward W. Robbins ("plaintiffs"), own and reside on a 38.4-acre parcel of land in Paris, Tennessee (the "property"), which supports a house, barn, shed, and machine shop. Plaintiffs purchased the property in 1975 as an investment that they eventually planned to sell in order to provide for their retirement.

On March 4, 1994, Keith Baker signed a land sales contract with plaintiffs to purchase the property for $9,000.00 an acre, or $351,000.00, and subsequently issued a check for a $100,000.00 deposit. Mr. Baker intended to sell the home and a portion of the acreage and develop the remainder of the land as a mobile home sales lot.

Shortly after the contract was signed, Mr. Baker's real estate agent, Joe B. Lipps, learned from a Paris, TN city employee that the property was in a floodplain and would require a permit for development. Mr. Lipps was also informed that the property might be wetlands. On March 7, 1994, plaintiffs contacted the U.S. Army Corps of Engineers (the "Corps") and requested that it determine whether regulated wetlands existed on the site; Carl Olsen, a representative from the Corps inspected the site a week later. The Corps based its wetlands determination on three environmental parameters: hydrophytic vegetation, hydric soils, and hydrology, in accordance with the 1987 Corps of Engineers Wetland Delineation Manual. On March 28, 1994, the Corps notified plaintiffs of its determination: The property contained jurisdictional wetlands pursuant to section 404 of the Clean Water Act, Federal Water Pollution Control Act Amendments of 1972, § 404, as amended, 33 U.S.C. § 1344 (1994).1/ The Corps advised plaintiffs to

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1/ Specifically, the determination stated that

> [t]he Robbins family property, which is located below 'headwaters' in the McGowan Branch watershed, reveals the presence or evidence of three characteristics of regulated wetlands on a large portion of the property including the majority of the highway frontage on SR 79. McGowan Branch and its adjacent wetlands are waters of the United States pursuant to Section 404 of the Clean Water Act.
>
> . . . .

retain a wetlands delineation expert and gave them information regarding the permit application process under section 404 and the pertinent regulation, 33 C.F.R. § 325 (1997).

In late March 1994, having been informed of the wetlands determination, and after receiving several estimates for the cost of site preparation and development, 2/ Mr. Baker demanded cancellation of the contract and a return of his deposit because "the wetlands determination made the land unsuitable for [his] use." Affidavit of Keith Baker, Mar. 27, 1997, ¶ 8. The parties dispute whether Mr. Baker or plaintiffs canceled the contract and whether plaintiffs would have a cause of action for breach of contract or specific performance in light of an escape clause in the contract. Although this unresolved issue is not particularly material to the takings issue, it does highlight the nature of the land sale cancellation as a private action. The parties also dispute whether the Corps knew of the land sale contract when it made its wetlands determination and, if so, to what effect.

In their April 1994 correspondence to the Corps, plaintiffs stated that the land sale had fallen through and that they would not be seeking a section 404 permit. Responding to plaintiffs' letter dated May 5, 1994, in which they stated that they could not afford to hire a wetlands expert for the wetlands delineation, the Nashville division of the Corps and the State of Tennessee Department of Environment and Conservation performed a joint wetlands delineation and investigated the site in August 1994. The subsequent delineation report, dated October 21, 1994, concluded that the approximately 39 acres of plaintiffs' property contained "25 acres of regulated wetlands" in two noncontiguous areas

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> . . . A wetlands delineation by a qualified consultant verified by our office is an acceptable procedure for determining the extent of proposed activities in regulated wetlands.

2/ While the parties stipulate that Mr. Lipps provided these estimates, he could not recall the details. The parties dispute the actual cost of developing the site, given the permitting requirements. Plaintiffs assert that defendant's estimate of $189,456.00 is a "gross exaggeration of the actual costs of developing the property."

in the east and west of the property. Plaintiffs subsequently hired Thomas Heineke, Ph.D., a Certified Wetlands Scientist, to conduct his own field investigation. Dr. Heineke reviewed the delineation report and provided written comments objecting to the extent of the wetlands on the Robbins property, which he felt was "grossly exaggerated." Although Dr. Heineke asserted that "the fescue dominated portions of the site are not jurisdictional wetlands," he did not specify how much of the property did comprise wetlands, and plaintiffs do not challenge the Corps' wetland designation in their complaint. 3/ The Corps responded to Dr. Heineke's objections by letter dated March 13, 1995, encouraging plaintiffs to submit a section 404 permit application to develop the property and noting that the "disturbed nature of the regulated wetlands on [the] property and the excellent on-site mitigation potential . . . [were] conducive to the preparation of an environmentally acceptable and approveable development plan."

On December 13, 1995, the Headquarters of the Corps, Waterways Experiment Station, re-evaluated the prior wetlands delineation of the Corps Nashville District. The site investigation focused on the disputed area of the fescue field on the West side of the property. Plaintiffs' experts, Dr. Heineke and Eugene Lampley, were among those present during the investigation of the subject property. The Corps issued a re-evaluation report on January 8, 1996, concluding that the original wetland delineation report of October 12, 1994 was correct and that 25 of the 39 acres of plaintiffs' property comprised jurisdictional wetlands.

At no point have plaintiffs submitted a section 404 permit application to develop the wetlands. On December 12, 1996 plaintiffs

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3/ Plaintiffs note, however, that there remain "serious questions regarding the extent to which such designation accurately reflects the existence of wetlands on the subject property." Plfs' Br. filed Aug. 18, 1997, at 1 n.1. However, by pursuing a takings claim, plaintiffs "must concede the validity of the Government action which is the basis of the taking claim to bring suit under the Tucker Act." Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802 (Fed. Cir. 1993) (citing Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 899 (Fed. Cir. 1986)).

filed their complaint in two counts to recover damages arising from the Corps' alleged taking of the land sale contract or, alternatively, the taking of the property without just compensation in violation of the Fifth Amendment.

DISCUSSION

1. Summary judgment standards

Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. RCFC 56(c). Summary judgment pursuant to RCFC 56 properly can intercede and prevent trial if the movant can demonstrate that trial would be useless in that additional evidence in connection with its motion could not reasonably be expected to change the result. **See Pure Gold, Inc. v. Syntex (U.S.A.), Inc.**, 739 F.2d 624, 626 (Fed. Cir. 1984). In ruling on defendant's motion for summary judgment, the court is mindful of the precedents admonishing against "precipitous grants of summary judgment" in "fact-intensive" takings cases. **Yuba Goldfields, Inc. v. United States**, 723 F.2d 884, 887 (Fed. Cir. 1983). However, the court has scrutinized the record to assure that no material facts are in dispute, that all presumptions and inferences are drawn in plaintiffs' favor and that defendant has discharged its burden to establish entitlement to summary judgment as both a matter of fact and law.

2. Takings issue

Analyzing a takings claims involves a 'two-tiered" inquiry into the governmental action resulting in a land use restriction. **M & J Coal Co. v. United States**, 47 F.3d 1148, 1153-54 (Fed. Cir. 1995). First, a court should assess the nature of the land owner's private property interest in order to determine whether a compensable interest exists. **See id.** at 1154 (citing **Lucas v. South Carolina Coastal Council**, 505 U.S. 1003, 1027 (1992)). Second, once the takings claimant has established the existence of a property interest, the court must determine whether the

governmental action at issue constitutes a compensable taking of private property for a public purpose. See M & J Coal, 47 F.3d at 1154. In making this latter determination, the court must engage in "'essentially ad hoc, factual inquiries."' MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 349 (1986) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)). This inquiry considers three central factors: 1) the character of the government action or regulation; 2) the economic impact of the government action on the property owner; and 3) the extent of the interference with the owner's investment-backed expectations. See Penn Central Transp. Co. v. New York City, 438 U.S. 104, 133 (1978); see also Kaiser Aetna, 444 U.S. at 175. Although both plaintiffs and defendant employ this three-prong analysis, they reach opposite conclusions.

Plaintiffs argue that the Corps' wetlands determination constitutes a government action resulting in a compensable taking of the land sale contract. In essence, plaintiffs assert that because the wetlands determination indirectly led to the cancellation of the land sales contract, the $351,000.00 in unrealized proceeds from the sale were "taken" and thus require compensation. Yet at oral argument on defendant's motion for summary judgment, plaintiffs' counsel seemed to argue that it was not the wetlands determination, rather, the wetlands delineation -- finding that 25 of 39 acres comprised wetlands -- that effectuated the taking of the contract. 4/

4/ In the context of discussing the wetlands determination, plaintiffs' counsel then shifted his argument to the subsequent wetlands delineation:

> But in our case what happened after that [the wetlands determination] was the Government went beyond that. The Government then did a full-blown determination [delineation?]. Something that is very unique. If we would put on evidence, we would show that the Nashville office had never done a full-blown delineation before.
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> . . . . I am not asking the court to say that every time you have the Government come out and make a determination it is a taking. We are not asking for that. We are not trying to change the law. We are just saying that under the unique set of facts of this case with that being the

The wetlands delineation occurred, however, five months after the contract was rescinded. Thus, the issue is whether the wetlands determination effectuated a taking of the land sale contract. Plaintiffs alternatively contend that the wetlands determination and delineation constituted a compensable taking of the property itself, because defendant "has taken for public use substantially all beneficial and productive use of [p]laintiffs' land." Compl. filed Dec. 12, 1996, ¶¶ 22-26.

As a threshold issue, the parties dispute how the wetlands designation and subsequent cancellation of the land sale contract should be characterized -- as a government action or a private action. Plaintiffs argue that, because the wetlands designation caused the cancellation of the land sales contract, it is a government action that effectuated a compensable taking. Defendant counters that the wetlands determination merely provided the impetus for the parties to cancel a private contract; hence, a private action, not a government action, is responsible for the non-realized proceeds, which plaintiffs claim were "taken."

That the parties dispute who actually canceled the contract -- plaintiffs or Mr., Baker, the buyer -- is immaterial. The fact remains that in no manner did the Corps preclude the sale of plaintiffs' property; the parties to the contract, not the Corps, caused the contract to fall though. Although the wetlands determination may have frustrated the land sale contract, it is well-settled that government action that merely frustrates expectations under a contract does not constitute a taking. **See 767 Third Street Assoc. v. United States**, 48 F.3d 1575, 1581 (Fed. Cir. 1995) (citing **Omnia Commercial Co. v. United States**, 261 U.S. 502, 510-11 (1923)); **see also NL Industries, Inc. v. United States**, 839 F.2d 1578, 1579 (Fed. Cir. 1988) ("[F]rustration of a business by

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only obstacle to the sale going through, that under those set of circumstances, it can be deemed a taking of the contract.

Transcript of Proceedings, Robbins v. United States, No. 96-779L, at 31-32 (Fed. Cl. Oct. 27, 1997).

loss of a customer [is] not a taking."); **Kearney & Trecker Corp. v. United States**, 688 F.2d 780, 783 (Ct. Cl. 1982) (finding no taking when the "[G]ovemment did not appropriate any of the rights the plaintiff had under the contract but only made it impossible for the plaintiff to perform it").

For similar reasons, plaintiffs' alternative argument regarding the taking of the "commercial value" of the land also fails. The fact that the wetlands determination may have prompted the recision of the land sale contract, or precluded a future contract with a similarly attractive price per acre, also is not material. The Corps has jurisdiction to issue a permit to fill jurisdictional wetlands pursuant to section 404. **See United States v. Riverside Bayview Homes, Inc.**, 474 U S 121 126 (1985). The wetlands designation itself cannot constitute a taking, as "it is quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a taking." **Id**. at 126 (citing **Hodel v. Virginia Surface Mining & Reclamation Ass'n**, 452 U.S. 264, 293-97 (1981)). The wetlands designation does not preclude the sale or development of plaintiffs' property; rather, it merely precludes development without a permit. **See Tabb Lakes, Ltd. v. United States**, 10 F.3d 796, 800-01 (Fed. Cir. 1993). Indeed, the possibility that the Corps may grant plaintiffs a permit precludes the wetland determination from constituting a taking. **See id**. at 801 (citing **Riverside Bayview**, 474 U.S. at 127) (The permit requirement "does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted . . . ."). The requisite government action is often supplied in takings cases when the Corps or other Government entity declines to grant a permit to an applicant to use its land in a particular way. That is not the case here, as plaintiffs have never applied for a section 404 permit.

The second prong of the takings inquiry focuses on the economic impact of the alleged government action, here the wetlands determination. **See Penn Central**, 438 U.S. at 124; **see also Pennsylvania Coal Co. v. Mahon**, 260 U.S. 393 (1922). Plaintiffs assert that by designating as wetlands 25 of the 39 acres of plaintiffs' property, the Government "destroyed the commercial value of th[e] property." Plfs' Br. filed Aug. 18, 1997, at 15. The parties hotly dispute the fair market value of the property at the time of the wetlands designation. Plaintiffs argue that the fair market value was $351,000.00 -- the value that Mr. Baker, the buyer, was willing to pay for the

property. Defendant challenges this figure by pointing to the 1997 tax appraisal of the property for $65,600.00 and arguing that, absent an independent fair market value appraisal, 5/ one could not conclude that the value of the property had actually declined.6/ Given the terrain and hydrology of the property, defendant argues, the property's value is probably far closer to the 1997 tax appraisal of $65,600.00 than the contract price of $351,000.00. Once again, the disputed issue of the amount to which the property's value diminished is not material, given that the purported economic impact - the loss of the contract proceeds or drop in the commercial value of the property -- was not caused by government action, *i.e.*, denial of a permit.

Assuming, *arguendo,* that the property's value did decrease, long-standing precedent nevertheless holds that the mere "diminution in a property's value, however serious, is insufficient to demonstrate a taking." **Concrete Pipe and Products of Ca. Inc. v. Construction Laborers Pension Trust,** 508 U.S. 602, 604 (1993) (citing **Village of Euclid v. Ambler Realty Co.**, 272 U.S. 365, 384, (1926)) (approximately 75% diminution in value due to zoning law). As the Supreme Court noted in **Lucas**, 505 U.S. at 1004 the economic impact factor may be dispositive if the regulation categorically deprives the claimant of "all economically viable use" of the property. Plaintiffs argue that the wetlands designation precludes them from maximizing the potential profit from selling the property. An inability to maximize profits, however, is insufficient to establish the deprivation of "all

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5/ Plaintiffs have provided three virtually identical affidavits that purport to demonstrate the fair market value of the property. The affidavits state that "the Robbins' property was extremely marketable and the $351,000.00 sale price was certainly reasonable." Affidavit of William M. Johnson, Aug. 7, 1997, ¶ 7; Affidavit of Samuel R. Striker, Aug. 7, 1997, ¶ 7; Affidavit of Harold Bass Jr., Aug. 8, 1997, ¶ 7. Only one of the affiants is a certified appraiser, and none of the affidavits reflects an independent appraisal of the fair market value of the property.

6/ As defendant notes, plaintiffs purchased the property in 1975 for $36,000.00; in 1994 the appraised value of the property was $65,100.00, and in 1997 the appraised value was $65,600.00. Although the value of the property as set by tax appraisal is not equivalent to the fair market value, it is open to dispute what the fair market value of the property was before and after the alleged taking occurred.

economically beneficial or productive use" of the property, as required for a compensable taking under **Lucas**. **Id**. **But cf**. **Florida Rock Indus., Inc. v. United States**, 18 F.3d 1560, 1570 (1994) (discussing "balancing of competing values" "when a partial loss of economic use of the property has crossed the line from a noncompensable 'mere diminution' to a compensable 'partial taking.'")

The third factor of the takings inquiry is the extent to which the government action interferes with plaintiffs' reasonable investment-backed expectations. **Penn Central**, 438 U.S. at 124; **see also Keystone Bituminous Coal Ass'n v. DeBenedictis**, 480 U.S. 470, 492 (1987). Plaintiffs had originally purchased the property as an investment and insist that the Corps' wetlands determination and delineation interfered with their reasonable investment-backed expectations. Because the property "was not subject to frequent flooding or persistently wet condition" and because neighboring property had sold for "sums that greatly exceeded the canceled land sale contract price," Plfs' Br. filed Aug. 18, 1997, at 21, plaintiffs argue that they reasonably could have expected that their land would have the same value. They point to the commercial development of the adjoining neighbor's property as further evidence of the reasonableness of their expectations. However, that these expectations were reasonable is unclear; they existed without the knowledge that 25 of the 39 acres of the property, including acreage that abutted the highway, comprised jurisdictional wetlands.

In **Penn Central** the Supreme Court rejected, as "quite simply untenable" the argument that property owners "may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development . . . ." 438 U.S. at 130; **see also Deltona Corp. v. United States**, 228 Ct. Cl. 476, 491, 657 F.2d 1184, 1193 (1981) (finding that denial of highest economic use of property "does not form a sufficient predicate for a taking."). Plaintiffs' taking claim unfortunately amounts to little more and does not establish the requisite elements for a compensable taking.

3. Ripeness of plaintiffs' claims

The ripeness doctrine functions to prevent courts "from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." **Abbott Labs. v. Gardner**, 387 U.S. 136, 148-49 (1967). Defendant contends that this case is not ripe because plaintiffs have not sought a permit under section 404 of the Clean Water Act. Federal Water Pollution Control Act Amendments of 1972, § 404, as amended, 33 U.S.C. § 1344 (1994).

Plaintiffs acknowledge the general rule regarding the ripeness of a takings claim: "[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." **Williamson County Reg'l Planning Comm' n v. Hamilton Bank**, 473 U.S. 172, 186 (1985); **see also MacDonald, Sommer & Frates**, 477 U.S. at 349. Only when a section 404 permit is applied for, denied, and prevents "'economically viable' use of the land in question" can there be a taking. **Riverside Bayview**, 474 U.S. at 127.

To date plaintiffs have declined to seek a section 404 permit; they assert that exhausting the section 404 permitting process would be "futile" for two reasons, and therefore is not required before they can bring a takings claim. First, they argue that the taking occurred at the time of the wetlands designation and the subsequent cancellation of the land sale contract, so at that point the takings claims ripened. Therefore, plaintiffs contend, "[a]n after the fact § 404 permit application would in no way serve to clarity the extent to which the regulatory action interfered with [p]laintiffs' property rights." Plfs' Br. filed Aug. 18, 1997, at 24. To the extent that the genesis of plaintiffs' takings claim allegedly occurred at the time of the wetlands determination, the issue presents a controversy ripe for review.

Second, plaintiffs contend that the permit application process, particularly the allegedly expensive mitigation requirements, would be "unduly burdensome" and thus futile. Plfs' Br. filed Aug. 18, 1997, at 25. Although plaintiffs cite several cases to support the contention that resorting to the section 404 permit process would be futile, they are distinguishable. For example, in **Broadwater Farms Joint Venture v. United States**, 35 Fed. Cl. 232, 235 (1996), plaintiff began improvements to its property without a permit until the Corps ordered a complete and immediate restoration of the property to its natural wetlands condition. The court found that "[n]o reasonable landowner would find a 'door left open' for obtaining a permit [under] the circumstances of this case" and that the "Corps would not allow development." **Id**. at 237; **see also MacDonald, Sommer & Frates,** 477 U.S. at 352 (noting takings question in doubt because of the "possibility that some development will be permitted"). The Corps has manifested an apparent willingness in the instant case to work with plaintiffs to prepare a development plan and to secure a section 404 permit.7/

7/ Keith Wade Whittinghill, the Corps Regulatory Project Manager in charge of the wetlands determination of plaintiffs' property, avers:

> I explained the Corps of Engineers' permit application process to Mrs. Robbins in detail and I assured her that the Corps would gladly assist her in any way should she decide to apply for a permit. I also informed Mrs. Robbins that, while we could not guarantee what the final decision would be on any permit application, she had a situation lending itself to the preparation of a development plan which would be environmentally acceptable and approveable by the Corps given the disturbed nature of the wetlands on the property and the excellent on-site mitigation potential.

Affidavit of Keith Wade Whittinghill, Sept. 9, 1997, ¶ 3. Mrs. Robbins states that "Mr. Whittinghill mentioned mitigation but never gave me specific information. Mr. Whittinghill made it clear on numerous occasions that there was no guarantee that a permit would be issued for my property in the event that I did apply." Affidavit of Nancy A. Robbins, Oct. 3, 1997, ¶ 6. This is not akin to denying a permit application, contrary to plaintiffs' intimation during oral argument.

Plaintiffs place greater emphasis on what they term an "'economic futility' argument." Plfs' Br. filed Oct. 7, 1997, at 2. Plaintiffs cite **Hage v. United States**, 35 Fed. Cl. 147, 164 (1996), for the proposition that they need not exhaust the section 404 permitting process if the procedure "is so burdensome that it effectively deprives the property of value." Not only is **Hage** distinguishable, but this quotation omits another factor involved in showing futility 8/ and does not contemplate speculation as to the expense of the permitting process.

Plaintiffs assert that in order to "retain the commercial value of the property" a permit must be sought to fill the entire 25 acres of wetlands "to clear the taint of the wetlands designation on the entire parcel." Plfs' Br. filed Oct. 7, 1997, at 34. Attempting to explain the economic futility of on-site mitigation, plaintiffs present a conservative hypothetical indicating that even assuming a one-to-one acre exchange, 9/ the cost of mitigation could exceed the land sale contract by $11,000.00. **Id.** at 4. Plaintiffs' hypotheticals aside, the cost of determining and fulfilling an acceptable mitigation plan under the Corps' mitigation guidelines is completely speculative. 10/ Without a section

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8/ **Hage** cites two factors involved in a showing of futility: "[T]he law does not require plaintiffs to apply for a permit if the procedure itself is not a reasonable procedure, and is so burdensome that it effectively deprives the property of value." 35 Fed. Cl. at 164 (citations omitted).

9/ The Corps' mitigation policy under section 404 is set forth in the Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 7, 1990) (the "MOA"). In keeping with a policy of no net loss of wetlands, the Corps will generally require that at least 1 acre of wetlands be created for every 1 acre that is filled. However, the MOA also states that "the ratio may be less than 1 to 1 for areas where the . . . likelihood of success associated with the mitigation proposal is high." MOA at 6.

10/ Under the plaintiffs' hypothetical and a one-for-one acreage exchange, plaintiffs would need to purchase eleven acres, so that when added to the 14 non-wetland acres of their property, the resulting 25 acres equals the 25 acres of wetlands which will be filled. The hypothetical, however assumes a purchase price of $10,000.00 per acre, which may be inflated given that the Robbins' land and buildings were to be sold for

404 permit, one cannot know whether, as plaintiffs contend, the cost of mitigation would be "economically impractical," or would, in fact, be akin to a permit denial.

As the Federal Circuit recently expounded, "the futility exception simply serves 'to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved.'" **Howard W. Heck, and Assocs., Inc. v. United States**, No. 97-5064, 1998 WL 23954, *3 (Fed. Cir. Jan. 23, 1998) (quoting **Southern Pac. Transp. Co. v. City of Los Angeles**, 922 F.2d 498, 504 (9th Cir. 1990)). In the case at bar, plaintiffs have not demonstrated this type of futility, and their speculative economic futility arguments enjoy little legal support.

Therefore, plaintiffs' takings claim -- pinning the taking to the wetlands determination -- is ripe for review whereas a takings claim based on a denial of a section 404 permit is obviously not ripe, but would be in the future if plaintiffs apply for, and are denied, a section 404 permit.

While the court is sympathetic to plaintiffs' plight, it cannot disregard existing precedents and invent new law. The wetlands determination and delineation themselves are insufficient to constitute a compensable taking, as they do not supply the requisite government action required by **Penn Central** and its progeny. While it may be true that the wetlands determination directly or indirectly caused the land sale to fall through, this was a private, not a government action. Plaintiffs may continue to use their property as they always have, but in order to fill the wetlands they must seek a section 404 permit with the Corps. If, however, the Corps denies plaintiffs a section 404 permit, a final action, then plaintiffs have an entirely different case, for then they can demonstrate the requisite government action. The Corps has expressed its willingness to assist plaintiffs with the permitting process, and the

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$9,000.00 an acre and they were in a commercially desirable location abutting a highway.

court has no reason to believe that such assistance will not be forthcoming.

CONCLUSION

Accordingly, based on the foregoing, defendant's motion for summary judgment is granted. The Clerk of the Court shall enter judgment for defendant.

IT IS SO ORDERED.

No costs.

"s/ Christine O.C. Miller "
Christine Odell Cook Miller
Judge